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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

GARY CLAUSEN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether Officers had probable cause to stop or detain defendant in that all of the activity observed by the officer was consistent with legal conduct and the officer had no reasonable belief that a bag observed being exchanged contained contraband.

2. Whether Officers had probable cause to conduct a warrantless search of the trunk of defendant's automobile or of the paper bag inside.

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LIST OF PARTIES IN THE PROCEEDING BELOW

The parties to the proceedings in the court below were the People of the State of California represented by its attorneys: Daniel Lungren, the Attorney General of the State of California; Ira Reiner, The District Attorney of the County of Los Angeles; George Williamson, Chief Assistant Attorney General; Ronald A. Bass, Senior Assistant Attorney General; and Joanne S. Abelson and Jeremey

Friedlander, Deputy Attorneys General. Peter N. Priamos represented Petitioner in the proceedings below.

PETITION FOR WRIT OF CERTIORARI

GARY CLAUSEN, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of the County of Los Angeles, State of California, the affirming of said judgment by the Court of Appeal of the Second Appellate District of the State of California, and the denial of review by the Supreme Court of the State of California, which denial of review was entered on August 11, 1993 .

OPINIONS BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District, is reprinted in the Appendix attached hereto. The Order of the Supreme Court of the State of California denying review dated August 11, 1993 is reprinted in the Appendix attached hereto.

STATEMENT OF JURISDICTION

The decision of the Court of Appeal of the State of California was entered on April 30, 1993 . The Denial of the petition for review to the California Supreme Court was entered on August 11, 1993 . The jurisdiction of this Court

is invoked pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated...."

STATEMENT OF THE CASE

On August 22, 1990 and August 23, 1990, a preliminary hearing was held in the Municipal Court of Los Angeles Judicial District, before the honorable David M. Horwitz, Judge, and Petitioner, Gary Clausen was held to answer. (Clerk's Transcript in California Appellate Proceeding[hereinafter "CT"] 1-149)

On August 29, 1990, an Information was filed in the Los Angeles Superior Court charging Petitioner with violations of Penal Code, Section 182(1) [conspiracy to sell cocaine], Health & Safety Code, Section 11352(a) [sale or transportation of cocaine], with a special allegation based on quantity pursuant to Penal Code, Section 1203.073(b)(1).

(CT 151-156)

On August 29,1990, Petitioner was arraigned and pled not guilty. (CT 163)

On October 25, 1990, Petitioner filed a Notice of Motion and Motion to Suppress Evidence Pursuant to Penal Code, Section 1538.5. (CT 165)

On October 25, 1990, Petitioner filed a Notice of Motion and Motion to Set Aside Information Pursuant to Penal Code, Section 995. (CT 184)

On February 27, 1991, the People filed their opposition to Petitioner's motion to suppress evidence. (CT 209)

On August 23, 1991, Petitioner and Respondent stipulated that there was no search warrant for the search of the subject automobile wherein contraband was found. (CT 237)

On September 3, 1991, the Information was amended, re-alleging the violation of the same code sections against Petitioner. (CT 157)

Petitioner pled not guilty to the amended Information. (CT 239)

On August 23, 1991, Petitioner's motion pursuant to Penal Code, Section 1538.5 was denied. (CT 237)

On October 7, 1991, the People amended the Information to add Count 5, i.e., violation of section 11351 of the Health and Safety Code, with a special allegation pursuant to Penal Code, Section 1203.073(b)(1). (CT 240)

Petitioner withdrew his plea of not guilty, and pled guilty to Count 5. (CT 240)

On November 22, 1992, Petitioner filed his Notice of Appeal. (CT 244)

Petitioner was released pending appeal and was required to post an Appeal bond of $25,000.00. (CT 242)

Officers, based on information from a confidential informant, had been conducting a surveillance of two individuals, DRANES and WEINGARTEN, over a period of months. Evidence was introduced regarding meetings between DRANES, WEINGARTEN and a third person, GOLD, at which packages were exchanged. A package had been exchanged on May 22, 1990. (CT 6, 8, RT 136(22)-137(1))

On June 1, 1990, GOLD gave DRANES a shaving kit. The shaving kit was placed in DRANES' car and was taken to a meeting with WEINGARTEN. WEINGARTEN

was given the shaving kit and went to an apartment complex where DRANES lived. WEINGARTEN went into the complex. DRANES arrived and also went in. DRANES existed, and met with a male, and the shaving kit was given to this third party. This third party left and met with another person. Their trunk was opened as if they were displaying something. These individuals were arrested and $140,000.00 was found in the satchel. (CT 8-19)

A second purported exchange between DRANES and a third party was made on June 5, 1990. However, officers were never able to ascertain the contents of a certain gym bag that was exchanged on that date due to evasive maneuvers of a third party. (CT 20-24)

Meetings between DRANES and WEINGARTEN were observed over a month's period. (CT 25)

On July 10, 1990, DRANES left his residence and went to Ventura Boulevard and Haskell. (RT 151(1)-(2)) DRANES was asserted to be using "counter-surveillance" type driving on that date. (RT 151(4)-(5)) However, another officer testified that nothing in the manner he drove was unusual or significant. (RT 47(9)-(12)) DRANES parked his car in a parking lot. Petitioner parked his vehicle in the

same parking lot and the two nodded to each other. (RT 151(27)-152(13)).

Petitioner exited his vehicle, went to the trunk of his vehicle, and opened it. He walked over to the passenger side of DRANES' vehicle and opened the passenger door. DRANES handed him a paper bag that was folded. The bag was placed in the trunk of Petitioner's car. Petitioner then exited the parking lot in his vehicle. (RT 152(13)-(26))

Officers had no specific knowledge as to what was contained in this rolled up bag. (RT 152(13)-(26)) No evidence was presented of any drug purchases made immediately prior to this transaction.

Based solely on such facts, Petitioner's vehicle was ordered stopped. (RT 153(13)-(27)) Petitioner was removed from his car, handcuffed and directed to sit on the curb. (RT 159(22)-(25))

Without a warrant and based on a claim that Petitioner had given consent, Petitioner's trunk was searched. In the trunk, the detective found a brown grocery type bag with a substance resembling cocaine inside. (RT 154(23)-(28))

At the time Petitioner is claimed to have given his

consent, he was handcuffed out of his car, sitting on a curb. (RT 159(22)-(25)) In addition to Detective Voelker, uniformed officers from a black and white police vehicle were also present at the scene. Although the officer claimed the handcuffs were for the safety of the officers who initially stopped Petitioner, no weapon was observed. (RT 160(1)-(18)) The officer did not advise Petitioner he had a right to refuse to consent to the search. (RT 162(9)-(11)) Petitioner appeared nervous. (RT 162(20)-(22) Petitioner was not stopped for a traffic violation. (RT 163(8))

Detective Voelker testified that it was customary to have suspects execute written consent forms for a search, but he did not have one, and did not ask the officers in the black and white for the form. (RT 164(2)-(11))

Petitioner testified that he was stopped by some black and white vehicles, who had their sirens going and red lights on. (RT 178(13)-(18)) After the stop, one officer was pointing a shotgun at Petitioner and the other officer was telling Petitioner to get out of his vehicle and drop his keys. (RT 179(4)-(7)) He was handcuffed and sitting on the curb when Detective Voelker approached him. (RT 179(18)-(19))

When Detective Voelker asked him for permission to search his car, Petitioner stated "no sir." (RT 181(27)) Voelker then walked to the car, picked up the keys and went directly to the trunk and opened it. (RT 182(3)-(4))

At trial, the court held that there was probable cause to search Petitioner's vehicle based on the totality of the circumstances. However, the court explicitly refused to make a ruling as to whether or not a valid CONSENT had been given. The court stated:

> "I do not reach the issue of the consent, although I do have a question of credibility on that issue, but I don't need to reach that." (RT 220(10)-(12))

There was no search warrant for Petitioner's vehicle, nor was there a search warrant for the bag located in the trunk of Petitioner's vehicle. (CT 237)

REASONS FOR GRANTING THE WRIT

I

POLICE LACKED PROBABLE CAUSE TO SEARCH PETITIONER'S AUTOMOBILE AND THE BAG CONTAINED

THEREIN

Evidence seized in violation of the Fourth Amendment of the United States Constitution is inadmissible in state court. (United States Constitution, Amendment IV ["The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated...."]; Mapp v Ohio (1961) 367 U. S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 [all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court]).

In presiding over the hearing on a motion under Penal Code section 1538.5, the trial court is sitting as a finder of fact. Accordingly, on review, the trial court's factual findings, whether express or implied, must be upheld if they are supported by substantial evidence. (People v Lawler (1973) 9 Cal. 3d 156, 160, 107 Cal. Rptr. 13) However, since the reasonableness of the search is an issue of law, an appellate court conducts an independent review of the trial court's conclusion. In the event of an appeal, "it becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier,

against the constitutional standard of reasonableness.")Ibid; People v Loewen (1983) 35 Cal. 3d 117, 123, 196 Cal. Rptr. 846)

The standard under the United States Constitution for determining the existence of probable cause is whether "given all the circumstances...there is a fair probability that contraband or evidence of a crime will be found in a particular place." (Illinois v Gates (1983) 462 U. S. 213, 238, 76 L. Ed. 2d 527, 103 S. Ct. 2317)

Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts. (Illinois v Gates (1983) 462 U. S. 213, 232, 76 L. Ed. 2d 527, 544, 103 S.Ct. 2317) Probable cause is a "particularized suspicion" (Texas v Brown (1983) 460 U.S. 730, 742, 75 L. Ed. 2d 502, 103 S. Ct. 1535)

Probable cause consists of "facts that would lead a man of ordinary caution...to entertain...a strong suspicion that the object of the search is in the particular place to be searched." (Wimberly v Superior Court (1976) 16 Cal. 3d 557, 564, 128 Cal. Rptr. 641)

This test of probable cause applies to warrantless automobile searches. (Brinegar v United States (1949) 338

U. S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302)

A search of a motor vehicle is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. (United States v Ross (1982) 456 U.S. 798, 809, 72 L. Ed. 2d 572, 584, 102 S. Ct. 2157)

Police officers who have legitimately stopped an automobile and have probable cause to believe that contraband is concealed somewhere within may conduct a warrantless search of the vehicle, including compartments and containers within the vehicle whose contents are not in plain view, that is as thorough as a magistrate could authorize in a warrant particularly describing the place to be search. (United States v Ross (1982) 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157)

However, merely being present where drugs are sold does not constitute probable cause to search. (Ybarra v Illinois (1979) 444 U.S. 85, 91, fn 3, 62 L.Ed. 2d 238, 245, 100 S.Ct. 338)

A factor in evaluating the incriminating nature of a defendant's association with a particular location where drugs are sold is whether the known criminal activity was

contemporaneous with the association. (United States v Hillson (9th Cir. 1984) 733 F. 2d 692, 697)

Furthermore, the test is an objective one. The dispositive inquiry on a motion to suppress evidence found in an automobile search is whether the OBJECTIVE facts demonstrate the officers had probable cause to believe that the vehicle contained contraband. (People v Superior Court(Overland) (1988) 203 Cal. App. 3d 1114, 250 Cal. Rptr. 458)

In the case at bar, although Petitioner was observed to meet with an individual under surveillance for alleged drug activities, there was nothing in the record to suggest that such individual had purchased drugs, or in fact, possessed drugs, in close proximity to the date of the meeting with Petitioner. Clearly, officers had no articulable facts from which they could conclude that this individual had drugs at the time of such meeting with Petitioner. Merely meeting a drug suspect should not be sufficient to establish probable cause for a search without a warrant.

With respect to the fact that a bag was given to Petitioner, the evidence was not sufficient to demonstrate that such bag contained contraband. Clearly, officers had no

specific knowledge that the drug contained contraband. In fact, officers had no specific knowledge that the individual meeting Petitioner even possessed contraband. The assumption that this bag contained contraband was pure speculation. The bag was one issued by a store, with a store's name on it. It could have contained anything from food products to clothing. Furthermore, the fact that nothing was given in exchange for the bag tended to indicate that it was something other than a drug sale.

The evidence was clear that despite months of surveillance of several individuals, Petitioner had never been previously observed with the individuals under surveillance. No prior asserted criminal activity can be attributed to Petitioner.

Following the meeting where the bag was placed into Petitioner's trunk, officers stopped Petitioner without any other justification or cause. There was nothing unusual about Petitioner's conduct contributing to a claim of probable cause to search. There were no furtive gestures to support the claim that probable cause to search existed.

Petitioner contends that the observation of the bag did not create probable cause to search. The bag and its

exchange were entirely consistent with innocent behavior. In People v Holt (1989) 212 Cal. App. 3d 1200, an officer observed in plain sight a ball of aluminum foil in protruding from defendant's pocket. The Court of Appeal held that certain types of containers are distinctive drug-carrying devices that may be seized upon observation, e.g., heroin balloons, paper bindles and marijuana smelling brick-shaped packages. However, the court held that common containers, such as pill bottles, cigarette packs, plastic bags and film canisters are generic and may not be seized merely because they may be used to store narcotics.

In United States v Rigales (5th Cir. 1980) 630 F. 2d 364, 367, a zippered leather case was held to give no indicia of illegal contents, and therefore, such common container, could not be utilized to demonstrate probable cause for its search.

In People v Jones (1991) 228 Cal. App. 3d 519, the court concluded that the mere fact that a person receives money from another person on the street in an area known for drug activity is insufficient justification for a detention. If such facts are insufficient for a detention, they are clearly insufficient for a search without a warrant.

In People v Nonnette (1990) 221 Cal. App. 3d 659, 271 Cal. Rptr. 329, a case which held probable cause to exist under its facts, the court summarized the applicable law relating to containers and their supporting probable cause for a search. The court in People v Nonnette, supra, 221 Cal. App. 3d 659, 271 Cal. Rptr. 329, stated:

> "Courts have held that certain containers are so distinctive in nature that an officer may, based on his experience with such containers in previous arrests, have probable cause to search or seizure such a distinctive container in plain view. Examples of such containers are paper bindles (citation), heroin balloons (citation), and brick-shaped packages smelling like marijuana (citation). However where the container is a common one with legitimate purposes, its presence is not enough to establish probable cause.(citations)"

(Citing: Remers v Superior Court (1970) 2 Cal. 3d 659, 662, 87 Cal. Rptr. 202[tinfoil package]; People v Holt (1989) 212 Cal. App. 3d 1200, 261 Cal. Rptr. 89 [foil-

wrapped package]; People v Valdez (1987) 196 Cal. App. 3d 799, 242 Cal. Rptr. 142 [film canister])

The court in People v Nonnette, supra, 221 Cal. App. 3d 659, further discussed the effect of the holding in People v Huntsman (1984) 152 Cal. App. 3d 1073, 200 Cal. Rptr. 89)

In People v Huntsman, supra, 152 Cal. App. 3d 1073, 200 Cal. Rptr. 89, while on a vice assignment in an area known for prostitution, police observed two men standing near an open trunk of a car. One man was holding a plastic bag. The police could not see the bag's contents. When the police approached the car, the man slammed the trunk closed. The officers then yelled "Police, stop' and the men hurried away. The police detained defendant, who refused to identify himself. The police opened the locked trunk and found the plastic bag which contained smaller baggies with white powder inside. The People argued that there was probable cause for the search relying on the following factors: defendant was holding the plastic bag, the person next to him appeared to be a lookout, it was in a high prostitution area, defendant slammed the trunk closed when the police approached, the men walked away faster

after the police identified themselves, defendant refused to identify himself, and when detained, defendant had the keys to the trunk but not the bag. The court held this was NOT sufficient probable cause for the search.

The court in People v Huntsman, supra, 152 Cal. App. 3d 1073, 200 Cal. Rptr. 89, stated that whether a common container constitutes a suspicious circumstance capable of contributing to a totality of circumstances necessary for probable cause depends on the total factual context in which the container is observed. The court stated that although an officer may know that ordinary brown paper bags are commonly used in narcotics transactions, absent evidence that the person carrying such a bag has RECENTLY sold narcotics or otherwise possessed narcotics, the act of carrying such a baggy by itself will not provide reasonable cause to an officer to suspect the citizen is carrying narcotics. (Id. at p. 1088)

The court in People v Huntsman, supra, 152 Cal. App. 3d 1073, 200 Cal. Rptr. 89, further held that an individual's concern with privacy while out of doors does not imply guilt. The act of looking around to see if anybody was watching them did not contributed to the probable cause

required to search the trunk of the automobile. The fact that a defendant placed a plastic bag into the trunk of his car, while looking around to see if anyone were watching, did not constitute probable cause to search the vehicle. Likewise, where an officer makes no observation of conduct objectively suggesting criminal activity, the mere avoidance of police officers by a citizen does not justify a detention.

In United States v Ingrao (7th Cir. 1990) 897 F. 2d 860, the Court of Appeals held that police did not have probable cause to make a warrantless arrest of defendant after he was observed carrying bag down a gangway previously used in suspicious transaction. The facts were that: on June 24, 1988, Angelo Ingrao was observed by agents of the Federal Bureau of Investigation (FBI) and officers of the Chicago Police Department walking down a gangway, previously used in a suspicious transaction, carrying an opaque black bag. The agents and officers followed Ingrao and stopped him while driving in his car. He was immediately removed from the car, placed face down on the ground and handcuffed. Members of the FBI and police then proceeded to remove his keys from the ignition and to open the trunk of his car. Once the trunk was open, the

agents removed a black opaque bag and opened it, discovering cocaine. The events leading up to Ingrao's arrest began in November of 1987, when the FBI commenced a narcotics investigation of an individual named Frank Gigliotti. On the morning of June 24, 1988, FBI agents, with the assistance of the Chicago Police, began a surveillance of Gigliotti at one of his residences. Gigliotti left that address driving a motorcycle and later stopped at a gas station to make a few telephone calls from a pay phone. The agents followed Gigliotti from the gas station to two motorcycle shops and then to a social club called the Friends of the South Club. After remaining approximately fifteen minutes at the club, Gigliotti then drove to his second residence, at 3453 Narragansett Ave., arriving at approximately 12:00 p.m. Gigliotti parked outside of the residence and disappeared from the view of the agents when he walked down a gangway between 3453 and 3459 Narragansett, presumably entering his house. At approximately 1:00 p.m., Agent Roberts observed a red Corvette pull up in front of 3453 Narragansett. The driver of the car was male and the passenger female. As the red Corvette approached, a man came out from the gangway located between 3453 and 3459

Narragansett and met the car. That person was not Gigliotti or Ingrao. A package appearing to be a gym bag was passed from the female passenger to the unknown man standing on the side of the street. Thereafter, the Corvette left, and the man carrying the package returned down the gangway disappearing from sight. The agents testified at trial that the Corvette then circled the area. At about 1:30 p.m., another man, unknown at the time but later identified as Ingrao, was observed walking out from the gangway. Ingrao was carrying a black opaque bag, but not the bag passed from the Corvette. Agents testified that as Ingrao walked toward the curb, he looked around the surrounding area. They further testified that as he crossed the two lane street he looked both ways. Ingrao proceeded across the street to the rear of a yellow Cadillac and opened the trunk. While placing the black bag into the trunk, Ingrao again looked about. He then closed the trunk, got into his car and drove away. Minutes after the defendant left Narragansett Ave., agents observed the same man as before emerge from the gangway carrying a small white package. The red Corvette returned and the man handed the driver the package. After a brief conversation, the car pulled away.

Agents attempted to follow the Corvette but lost it in traffic. Meanwhile, several of the agents were following Ingrao in the Cadillac. Ingrao drove directly toward the Friends of the South Club. The agents testified that while driving to that social club Ingrao looked several times in his rear view mirror. He was also observed using a car telephone while en route. Upon reaching the club, Ingrao went inside for approximately 45 minutes. When Ingrao left the club, he was accompanied by an unknown man. They entered Ingrao's car and drove to the Cacciatore Club. Both individuals entered that social club and came out about five minutes later. Ingrao and the man entered the car again and proceeded to drive south. A few minutes later, the police and FBI moved in and stopped Ingrao's vehicle.

The court in United States v Ingrao, supra, 897 F. 2d 860, stated:

> "The test for probable cause to arrest without a warrant was established by the Supreme Court in Beck. See also United States v. Hairston, 763 F.2d 233 (7th Cir.1985). In Beck, the Court held, "the police have probable cause to arrest an individual where 'the facts and

circumstances within their knowledge and of which they [have] reasonable trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense.'' United States v. Goudy, 792 F.2d 664, 668 (7th Cir.1986) (quoting Beck, 379 U.S. at 91, 85 S.Ct. at 225). See also Price, 888 F.2d at 1208-1209."

The court continued, stating:

"While probable cause 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,' mere suspicion is not enough. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); United States v. Serna-Barreto, 842 F.2d 965, 966 (7th Cir.1988). See also Price, 888 F.2d at 1209. Rather, as Judge Posner stated in Serna-Barreto, there must exist a high degree of suspicion to arrest without a warrant: 'An arrest is a profound and deeply resented interference with the liber-

ty of the person, and to allow police to arrest people on anything less than a high degree of suspicion would restrict personal liberty more than has been justified by the needs of public security." Serna-Barreto, 842 F.2d at 966."

The court held that the mere fact that the defendant in that case was carrying a bag and was in the vicinity of the prior illegal activity, did not, as a matter of law, establish probable cause for the arrest. Likewise, the alleged furtive gestures, i.e., of the defendant looking around, as well as his placing the bag in his trunk, did not contribute to a finding of probable cause.

In United States v Bonitz (10th Cir. 1987) 826 F. 2d 954, the court summarized some of the cases dealing with plain sight seizure of items based on their outward appearance. The court stated that absent some special exception, all containers and packages will receive the full protection of the fourth amendment during a police search. The court further cited United States v Dart (4th Cir. 1984) 747 F. 2d 263, 269, for the proposition that there is no "unworthy container" exception to the fourth amendment. The search of any opaque container whose size and shape do not

disclose its contents generally requires a warrant.

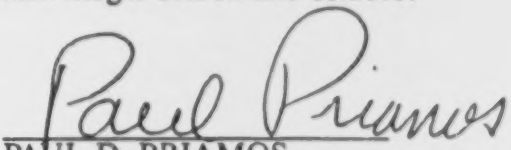
In the case at bar, officers had no knowledge that any of the persons they were observing had contraband in their possession. Clearly, as to Petitioner, he had never been observed previously despite a surveillance of many months. Police had no articulable facts from which they could assume that either of the individuals had contraband, or that the subject bag had contraband. Police did not observe or have any specific knowledge regarding a RECENT purchase of any contraband by the individual who gave the bag to Petitioner. No money was observed exchanged. Nothing in Petitioner's conduct after such exchange justified the subsequent stop and detention. There were no furtive gestures on the part of Petitioner.

CONCLUSION

Based on the foregoing, it is respectfully submitted that police lacked probable cause to stop, detain and search Petitioner's vehicle, and Petitioner's Penal Code Section 1538.5 motion to suppress evidence should have been granted. Petitioner seeks an order granting this Petition for Writ of Certiorari and for an order ultimately reversing the judgment and directing the trial court to exclude all evi-

dence obtained as a result of said illegal search and seizure.

DATED: November 9, 1993



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